No. 17-646

In The
Supreme Court of the United States

TERANCE MARTEZ GAMBLE,

Petitioner,

v.

UNITED STATES,

Respondent.

On Writ of Certiorari
to the United States Court of Appeals
for the Eleventh Circuit

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INTEREST OF AMICI CURIAE

Amici curiae are professors of criminal law, constitutional criminal procedure, and related disciplines who have studied, taught, written about, and litigated cases involving the Double Jeopardy Clause. Amici believe this case presents fundamental issues of double jeopardy law that concern our constitutional structure.*

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* No counsel for a party authored this brief in whole or in part, and no person other than amici made a monetary contribution to fund its preparation or submission. Counsel for all parties received timely notice of amici's intent to file this brief; all parties have consented to its filing.

The views expressed herein are those of the individual amici, not of any institution or group with which they are affiliated.

SUMMARY OF THE ARGUMENT

The Fifth Amendment guarantees that, "No person shall be . . . subject for the same offence to be twice put in jeopardy of life or limb." Yet that is precisely what happened to Terance Martez Gamble. The State of Alabama prosecuted and convicted him for being a felon in possession of a firearm. Subsequently, the United States initiated a second prosecution for what all parties have assumed is definitionally the same offense, yielding a second conviction. That second, duplicative prosecution and conviction violated the letter and spirit of the Double Jeopardy Clause.

As a matter of the Framer's understanding, as a matter of this Court's theoretical justifications for double jeopardy, and as a matter of policy respecting multiple prosecutorial powers, the United States should not be considered a double jeopardy sovereign that is completely independent of its constituent States. This Court ought to restore the double jeopardy right to its proper constitutional position, holding that as between the United States and Alabama, there is not—and never should have been—a "dual sovereignty" exception to the double jeopardy bar when identical offenses are prosecuted.

There is evidence that the Double Jeopardy Clause's straightforward text was understood at the time of the framing to protect very broadly against second prosecutions, regardless of the identity of the sovereign. *See* Br. of Amici Curiae Law Professors in Supp. of Pet'r 1 ("At the Founding and for several decades thereafter, a prosecution by one sovereign was understood to bar a subsequent prosecution by all other sovereigns."); *Abbate v. United States*, 359 U.S. 187, 203 (1959) (Black, J., dissenting) ("[I]t has been recognized that most free countries have accepted a prior conviction elsewhere as a bar to a second trial in their jurisdiction."). Although at first this might seem a surprising limit on prosecutorial power, upon reflection it is a most sound one. Without some reason to question the legitimacy of that first prosecution—and thereby to question the very legitimacy of the first sovereign—there is no utilitarian or retributive justification for bringing prosecutorial power to bear against the defendant a second time. A sovereign-agnostic conception of double jeopardy protection is therefore rooted in respect for coordinate jurisdictions and in notions of limited government power.

It was meant to be a simple case, then, when—as here—the alleged authority for the attempted second prosecution for an identical offense "derive[s] from the same 'ultimate source'" as that of the first. *Puerto Rico v. Sanchez Valle*, 136 S. Ct. 1863, 1867 (2016). In creating our federal structure, "[t]he Framers split the atom of sovereignty." *U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779, 838 (1995)

(Kennedy, J., concurring), "divid[ing it] between the government of the Union, and those of the states," *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 410 (1819). The Framers did not *clone* or *duplicate* sovereignty. Otherwise, the very core of our governing structure would be impossible, as an *independent* sovereign can never be *supreme* over another. *See* U.S. Const. art. VI. It is not surprising, then, that the Framers rejected proposed language that, most plausibly read, would have limited the Fifth Amendment double jeopardy bar to multiple federal prosecutions. *See* The Complete Bill of Rights: The Drafts, Debates, Sources, and Origins 467 (Neil H. Cogan ed., 2d ed. 2015) (chronicling the rejection of George Partridge's proposal to add the limiting phrase "by any law of the United States" after the current draft's "same offence"); *see also Abbate*, 359 U.S. at 203-04 (Black, J., dissenting).

Today, we have a very different conception of the scope and frequency of federal criminal prosecution than did the Framers. But changes in federal policy do not trump constitutional rules. What is more, there is not even a conflict in policy. The many and varied federal and state crimes that coexist today create a system of vast prosecutorial discretion. Moreover, applying this Court's long-standing interpretation of what definitionally constitutes the "same offence" reveals that this substantial discretion exists even where there has already been a prosecution concerning a particular historic event. Indeed, it is possible that even the crimes at issue in this very case are two

different offenses under *Blockburger v. United States*, 284 U.S. 299 (1932).[1] *See* 18 U.S.C. § 922(g)(1) (2012) (requiring "a crime punishable by imprisonment for a term exceeding one year" and also "affecting commerce"); Ala. Code § 13A-11-72(a) (2018) (incorporating diverse predicate offenses); *cf. Torres v. Lynch*, 136 S. Ct. 1619, 1630 (2016) (explicating "a settled practice of distinguishing between substantive and jurisdictional elements of federal criminal laws").

It is an almost impossible claim, therefore, that acknowledging a double jeopardy prohibition against duplicative state and federal prosecutions could seriously hamper the prosecutorial prerogatives of either the state or federal governments. There will be exceedingly few 'races to the courthouse' because so many avenues are open to both state and federal prosecutors. But in the rare instance when the second prosecution is for the identical offense already prosecuted, the text and animating purposes of the Double Jeopardy Clause dictate that the courthouse door should be closed.

Thus, on first blush, it is surprising to see this Court's historic pronouncements in favor of a federal/state dual sovereignty exception. A close look at those opinions, however, is revealing. Not only were the strongest pronouncements perhaps influenced by contexts of arguable federal crisis, *see* Br. of Amici

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[1] Amici take no position on whether such argument has been forfeited in this case; what we emphasize is that, under *Blockburger*, there is not even strongly reasoned policy for preserving a dual sovereignty exception.

Curiae Law Professors in Supp. of Pet'r 7-17, but all of the early cases stated the proposition in dicta, and they did so long before this Court settled on the *Blockburger* interpretation of same offense. Most importantly, this Court has never reconsidered the dual sovereignty exception after holding in 1969 that the double jeopardy protection is—contrary to the Court's earlier conception—incorporated as against the States. *Compare Benton v. Maryland*, 395 U.S. 784, 787 (1969) (incorporating the right), *with Bartkus v. Illinois*, 359 U.S. 121, 124-28 (1959) (discussing incorporation).

Considered in context, therefore, a rejection of a federal/state dual sovereignty exception would follow in the pattern of this Court's precedents. *See Murphy v. Waterfront Comm'n*, 378 U.S. 52 (1964) (rejecting a previous federal/state exception to the Fifth Amendment privilege against compelled self-incrimination); *Elkins v. United States*, 364 U.S. 206 (1960) (rejecting a previous federal/state exception to the Fourth Amendment exclusionary rule). If a state police officer's decisions can, as the Court held in *Elkins*, effectively bind a federal prosecution; and if a State's grant of prosecutorial immunity can, as the Court held in *Murphy*, effectively bind a federal prosecution; then it is hardly surprising that a State's *prosecution* should do the same. *See United States v. Balsys*, 524 U.S. 666, 683 (1998) ("After *Murphy* . . . the state and federal jurisdictions *were as one* . . . ." (emphasis added)).

In short, when it comes to the power of the United States to prosecute the identical offense already prosecuted by a constituent State, any purported "dual

sovereignty" exception to the double jeopardy right is not supported by constitutional text, history, political theory, or even by good policy.

ARGUMENT

I. The drafting history of the Double Jeopardy Clause strongly suggests that the Framers rejected a dual sovereignty exception.

The Double Jeopardy Clause of the Fifth Amendment provides: "No person shall be . . . subject for the same offence to be twice put in jeopardy of life or limb." When an early draft of the Clause was being debated in Congress, one member of the House of Representatives proposed an amendment that would have limited the Clause to federal offenses. That proposed amendment was rejected.

This significant detail of the Clause's drafting history has gone virtually unmentioned in the Court's jurisprudence. *But see Abbate v. United States*, 359 U.S. 187, 203-04 (1959) (Black, J., dissenting) (briefly mentioning the rejected amendment). The rejection of the amendment strongly suggests, however, that the framers and ratifiers of the Clause understood that it would apply to *any* successive federal prosecution, whether that prosecution followed a prior federal prosecution or a prosecution by a State.

On Aug. 17, 1789, the House of Representatives was considering the proposed Double Jeopardy Clause in

the form submitted to it by James Madison: "No person shall be subject, [except] in "cases" of impeachment, to more than one trial or one punishment for the same offence . . . ." 1 Annals of Cong. 781 (1789) (Joseph Gales ed. 1834).[2] After an unrelated motion by Rep. Egbert Benson was defeated, Rep. George Partridge of Massachusetts "moved to insert after 'same offence,' the words 'by any law of the United States.' " *Id.* at 782. But "[t]his amendment was lost also." *Id.* Had the Partridge motion passed, the Clause would then have read: "No person shall be subject except in cases of impeachment, to more than one trial or one punishment for the same offence by any law of the United States."

Unfortunately, there is no record of the debate or the numerical vote on this motion. Its rejection therefore seems susceptible of three interpretations.

First, perhaps the motion was meant to limit the double jeopardy constraint to the federal government, such that its rejection broadens the constraint to similarly prohibit the States from prosecuting twice for the same offense. *See* Jay A. Sigler, Double Jeopardy: The Development of a Legal and Social Policy 30-31 (1969) (suggesting that the motion's defeat implies "that double jeopardy may have been intended to apply to the states and the federal government alike"). This interpretation is highly implausible for at least two reasons. First, in no place in the Bill of Rights except for the first word of the First Amendment ("Congress"), and

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[2] The Annals of Congress erroneously omits the word "except."

in the phrase "any court of the United States" in the Seventh Amendment, is there an explicit limitation of the Bill to the federal government.[3] Yet, as far as we know, there were no other efforts to clarify the limited scope of the Bill; had a Member of Congress wanted to include such a limitation, there are many other places where he would have done so. It would have seemed far more obvious, for example, to include such a limitation at the beginning of what became the Sixth Amendment, which begins: "In *all* criminal prosecutions . . ." U.S. Const. amend. VI (emphasis added).

No such limitations were proposed because the common understanding of the founding generation was that the Bill implicitly bound only the federal government and not the States. As this Court said in *Barron v. City of Baltimore*, 32 U.S. (7 Pet.) 243, 247 (1833), the Constitution's "limitations on power, if expressed in general terms, are naturally, and . . . necessarily, applicable to the government created by the" Constitution, i.e., the federal government. The Court reached this unanimous conclusion without "much difficulty." *Id.*

The second reason that such an interpretation is not plausible is that Rep. Partridge was a Federalist, and a pro-administration Federalist at that. *See* John H. Aldrich & Ruth W. Grant, *The Antifederalists, the First Congress, and the First Parties*, 55 J. Pol. 295, 322

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[3] The first two proposed amendments, which went unratified in 1791, also explicitly applied only to the federal government. *See* Akhil Reed Amar, The Bill of Rights: Creation and Reconstruction 8-19 (1998).

(1993). As such, Partridge would have had no interest in limiting the reach of the Bill solely to the federal government. To the contrary, Federalist ideology supported the enhancement of the powers of the federal government at the expense of the powers of the States. For him to have moved to clarify that a constraint in the Bill of Rights applied only to the federal government and did not apply to the States would have made little sense.

Second, Partridge could have been using the word "law" to mean only statutory—not decisional—law, attempting to limit the Double Jeopardy Clause to only statutorily defined crimes and not common law crimes. Such an interpretation might be consistent with his political inclinations, given that such a move would enhance federal power by limiting the constraints of the Clause. But this interpretation is implausible for a separate reason.

Partridge would have known that the only basis for federal jurisdiction over federal crimes was the first clause of Article III, Section 2: "The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, *the Laws of the United States*, and Treaties made, or which shall be made, under their Authority . . . ." (emphasis added). If this judicial authority included the power to recognize and adjudicate federal common law crimes, then the phrase "the Laws of the United States" would necessarily include common law. Thus, pursuant to this second interpretation, Partridge would have believed both (1) that "laws of the United States" in Article III included the common law but, (2) that his proposed, virtually identical "law of the

United States" included only statutory law. That is implausible, to say the least.

Third, and most plausibly, by rejecting the Partridge motion, the framers of the Double Jeopardy Clause could have been rejecting the very dual sovereignty exception that this Court later created in *United States v. Lanza*, 260 U.S. 377 (1922), and reaffirmed in *Abbate*, 359 U.S. at 195. That is precisely how Justice Black understood the failed motion. *See id.* at 204 (Black, J., dissenting) ("I fear that this limitation on the scope of the Double Jeopardy Clause, which Congress refused to accept, is about to be firmly established as the constitutional rule by the Court's holding in this case . . . ."). Partridge, a pro-administration Federalist, likely understood that without his proposed limiting phrase, the Clause would be understood as forbidding a federal prosecution following a prior prosecution for the "same offence," whether that first prosecution was by the federal government *or by a State*.

Given the lack of historic record, we of course cannot be sure who voted to defeat Partridge's motion, nor why they did so. We can, however, make some educated guesses. Because Federalists greatly outnumbered Anti-Federalists in the First Congress, presumably it required a bloc of Anti-Federalists and anti-administration Federalists—a bloc that would soon achieve political dominance as Jeffersonian Republicans, *see* Aldrich & Grant, *supra*, at 301—to defeat the motion. They likely did so to give the Clause, and the rest of the Bill of Rights, the full import of their Anti-

Federalist design: to limit federal prosecutorial power in favor of that of the States.

The Bill of Rights was demanded by the Anti-Federalists in large part because they wanted to maintain the states' virtual monopoly on criminal justice. Some Anti-Federalists went so far as to claim that Congress's authority to define and punish crimes did not extend past the four crimes expressly enumerated in the Constitution. *See* Adam H. Kurland, *First Principles Of American Federalism and the Nature of Federal Criminal Jurisdiction*, 45 Emory L.J. 1, 54 (1996). Some Jeffersonian Republicans later repeated this claim, including Thomas Jefferson himself. *See* Thomas Jefferson, Kentucky Resolutions of 1798 and 1799, *reprinted in* The Virginia and Kentucky Resolutions of 1798 and '99 16 (Jonathan Elliott ed. 1832). Even those in the founding generation who did not share this rather extreme position saw a very limited role for the federal government to mete out criminal punishment. After all, the Anti-Federalists feared that the new, powerful central government might abuse whatever power it was given to create, prosecute, and punish crime, in order to oppress its enemies. *See* George C. Thomas III, *When Constitutional Worlds Collide: Resurrecting the Framers' Bill of Rights and Criminal Procedure*, 100 Mich. L. Rev. 145, 158-59 (2001). They sought to keep that power tightly cabined via a set of procedural restrictions that became a large portion of the Bill of Rights.

In this manner, the power to punish crime would overwhelmingly remain where it had been, in some instances, for over a century and a half: with the States.

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STATEMENT OF INTEREST[1]

Amici are criminal defense practitioners with years of experience defending individuals in federal and state criminal prosecutions, and criminal law professors with years of experience examining the criminal justice system. Given their frequent interactions with prosecutors and forums across multiple sovereigns and their study of criminal justice, *amici* are uniquely positioned to explain how discarding the so-called "separate-sovereigns" exception to the Double Jeopardy Clause will enhance the criminal justice system by providing appropriate incentives to both prosecutors and defendants, while encouraging Congress to identify unique federal elements that justify criminalizing conduct at the national level. The resulting improvements to the criminal justice system will inure to the benefit of all parties to that system—prosecutors, defendants, defense counsel, lawmakers, and courts alike—and, in turn, to the public at large.

A full list of *amici* is set forth in the appendix to this brief.

SUMMARY OF ARGUMENT

Elimination of the judicially created "separate-sovereigns" exception to the Double Jeopardy Clause not only makes sense as a matter of doctrine but also

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[1] Pursuant to Supreme Court Rule 37.6, *amici curiae* state that no counsel for any party authored this brief in whole or in part and that no entity or person, aside from *amici curiae*, their members, and their counsel, made any monetary contribution toward the preparation or submission of this brief. Pursuant to Supreme Court Rule 37.3, counsel of record for all parties have consented to this filing in letters on file with the Clerk's office.

would properly align incentives for prosecutors, defendants, and lawmakers on the local, state, and federal levels. In fact, nearly half of the states already prohibit prosecutions based on conduct previously prosecuted in federal court. Those state-law prohibitions have not created any undue obstacles to efficient criminal law enforcement.

Even without the judge-made separate-sovereigns exception, prosecutors for the second-in-time sovereign—whether federal or state—would remain capable of bringing a second prosecution so long as the offenses were, in fact, different. Under the test set forth in *Blockburger v. United States*, 284 U.S. 299 (1932), and its progeny, two offenses are sufficiently different for purposes of the Double Jeopardy Clause provided each contains an element that the other does not. That inquiry allows successive prosecutions for different offenses and incentivizes sovereigns to focus their criminal prohibitions on conduct that implicates their distinct concerns in our federal system. In particular, employing *Blockburger* rather than the separate-sovereigns exception incentivizes Congress to consider whether there is truly a distinct federal interest that justifies enacting a separate federal criminal offense and thus deters the overfederalization of criminal law and avoids wasted resources in the re-prosecution of crimes already prosecuted at the state and local levels.

Eliminating the separate-sovereigns exception would also facilitate plea bargaining, a practice that this Court has recognized enhances the administration of criminal justice. At present, the separate-sovereigns exception deters plea bargaining

because a guilty plea in a first-in-time prosecution can be used as near-conclusive evidence of guilt in a second-in-time prosecution by another sovereign. As a result, cases that could be efficiently resolved by a guilty plea needlessly consume significant resources of prosecutors, defense counsel, and the courts. Eliminating the separate-sovereigns exception will remove that artificial impediment to plea bargaining.

Finally, eliminating the separate-sovereigns exception should produce the same result whether the second-in-time prosecution is brought by the federal government or a state government. In our federal system, there is no reason for individuals to be subject to double jeopardy based on the identity of the second-in-time sovereign. The evolution and application of this Court's incorporation doctrine is one of the intervening legal developments that justifies reconsideration of the separate-sovereigns exception. And that same incorporation doctrine requires that the Double Jeopardy Clause must apply equally to the federal government and state governments. That result only makes sense in our federal system. Indeed, ensuring that both the federal and state governments are bound by a liberty-preserving provision like the Double Jeopardy Clause is critical to ensuring that the promise of the Framers that being subjected to two sovereigns would enhance, not reduce, liberty is fully realized.

ARGUMENT

I. Eliminating The Separate-Sovereigns Exception Will Not Impede, But Will Enhance, The Orderly Administration Of Criminal Justice In Our Federal System.

The separate-sovereigns exception has been justified on the basis of the supposed "undesirable consequences" that would follow if prosecution by one sovereign barred prosecution of the same offense by another sovereign. *Abbate v. United States*, 359 U.S. 187, 195 (1959); *see* U.S. Br. in Opp. to Cert. 7. Specifically, the United States has argued here that, "if a federal prosecution could bar [subsequent] prosecution by a State, the result would be a significant interference with the States' historical police powers." U.S. Br. 7. And if a state undertook the first prosecution, the United States contends, "'federal law enforcement must necessarily be hindered.'" *Id.* (quoting *Abbate*, 359 U.S. at 195).

These concerns are vastly overstated. As an initial matter, almost half of the states *already* bar a state prosecution based on conduct that has previously been prosecuted in federal court. Frequently these prohibitions are a matter of state statutory law; for example, California law provides that "[w]hen an act charged as a public offense is within the jurisdiction of the United States, or of another state or territory of the United States, as well as of this state, a conviction or acquittal thereof in that other jurisdiction is a bar to the prosecution or indictment in this state." Cal.

Penal Code §793.[2] In other states, comparable prohibitions are enshrined in the state constitution. *See, e.g.*, *State v. Hogg*, 385 A.2d 844, 847 (N.H. 1978) (holding that subsequent state prosecution following federal-court acquittal for the same crime is unconstitutional under state Double Jeopardy Clause). But in either case, the profusion of these proscriptions dramatically undercuts the contention that eliminating the separate-sovereigns exception would result in "significant interference with the States' historical police powers," or that the exception is necessary to the orderly administration of criminal justice.

More fundamentally, the absence of the separate-sovereigns exception would not mean that the federal government or state governments will be left without means to vindicate their distinct sovereign interests when prosecuting crimes. Any concerns that overruling the separate-sovereigns exception would leave the criminal law of a second-in-time sovereign unvindicated are better addressed by this Court's longstanding *Blockburger* doctrine, articulated in

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[2] *Accord* Ark. Code Ann. §5-1-114; 11 Del. Code Ann. tit. 11, §209; Ga. Code Ann. §16-1-8; Haw. Rev. Stat. §701-112; Idaho Code Ann. §19-315; 720 Ill. Comp. Stat. 5/3-4(c); Ind. Code Ann. §35-41-4-5; Ky. Rev. Stat. Ann. §505.050; Minn. Stat. Ann. §609.045; Miss. Code Ann. §99-11-27; Mont. Code Ann. §46-11-504; Nev. Rev. Stat. Ann. §171.070; N.J. Rev. Stat. §2C:1-11; N.Y. Crim. Proc. §40.20.2; N.D. Cent. Code Ann. §29-03-13; Okla. Stat. Ann. tit. 22, §§130-131; 18 Pa. Cons. Stat. and Cons. Stat. Ann. §111; Utah Code Ann. §76-1-404; Va. Code Ann. §19.2-294; Wash. Rev. Code Ann. §10.43.040; Wis. Stat. Ann. §939.71; *see also Commonwealth v. Cepulonis*, 373 N.E.2d 1136, 1141 (Mass. 1978) (generally adopting "same evidence" test to decide when a prior federal prosecution will bar a subsequent state prosecution).

Blockburger v. United States, 284 U.S. 299 (1932), and its progeny.

The *Blockburger* doctrine sets forth the "established test for determining whether two offenses" arising from the same act or transaction "are sufficiently distinguishable to permit" a prosecution for the second offense following a prosecution for the first offense notwithstanding the Double Jeopardy Clause. *Brown v. Ohio*, 432 U.S. 161, 166 (1977). Under *Blockburger*, two criminal offenses are not the "same offense" for double jeopardy purposes if each offense "requires proof of a fact which the other does not." 284 U.S. at 304. This test "emphasizes the elements of the two crimes," *Brown*, 432 U.S. at 166, and indeed has been described as the "same-elements test," *United States v. Dixon*, 509 U.S. 688, 696 (1993). In short, if "each offense contains an element not contained in the other," they are different offenses for purposes of the Double Jeopardy Clause. *Dixon*, 509 U.S. at 696.

Because of the separate-sovereigns exception, the *Blockburger* test has typically been applied only within a single sovereign—*i.e.*, to determine whether a single sovereign (a state or the federal government) may prosecute a second offense following its own prosecution of a first offense. At least in federal court,[3] there has yet been no occasion to apply the

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[3] A number of states that already prohibit subsequent prosecutions for the same offense across sovereigns have employed a *Blockburger*-like test to permit a subsequent state prosecution when the state and federal crimes are not the "same offense." *See, e.g.*, *People v. Dipre*, 70 N.Y.S.3d 823 (N.Y. Sup. Ct. 2018); *People v. Halim*, 223 Cal. Rptr. 3d 491 (Cal. Ct. App. 2017).

Blockburger test across two sovereigns—*i.e.*, to determine whether one sovereign may prosecute a second offense following a prosecution of a first offense by a different sovereign—because the separate-sovereigns exception has categorically removed that circumstance from the purview of the Double Jeopardy Clause. But there is no principled reason why, if the separate-sovereigns exception is eliminated, the *Blockburger* test would not apply across sovereigns in determining whether the offense a second sovereign seeks to prosecute is the "same offense" as the offense in the earlier prosecution.

As a result, abolishing the artificial separate-sovereigns exception—found nowhere in the plain text of the Fifth Amendment—will not categorically spell the end of a second-in-time sovereign's ability to vindicate its distinct sovereign interests. Rather, the second-in-time sovereign will be able to pursue its prosecution so long as it is not prosecuting the "same offense," *i.e.*, if the two offenses differ under *Blockburger*'s "same-elements" test. For example, if a human trafficker brings individuals into the country under false circumstances, *Blockburger* allows the federal government to prosecute visa fraud while state authorities prosecute sex trafficking offenses. *See, e.g.*, *Halim*, 223 Cal. Rptr. 3d at 499-501 (holding that federal visa fraud and state sex trafficking are different offenses under *Blockburger*). Similarly, in the case of health care fraud, a state may be able to prosecute state criminal health care fraud charges while federal prosecutors pursue charges of making a false statement to the United States. *Cf., e.g.*, *United States v. Gonzales*, 834 F.3d 1206, 1219-20 (11th Cir. 2016) (holding that federal conspiracy to commit

health care fraud, 18 U.S.C. §§1347, 1349, and conspiracy to defraud the United States, 18 U.S.C. §371, are different offenses under *Blockburger*). And someone transferring obscene materials to a minor to induce them into a sexual act could face federal charges for the transfer of materials and state charges for the enticement. *Cf., e.g., United States v. Taylor*, 777 F.3d 434, 438-40 (7th Cir. 2015) (holding that federal prohibition on transfer of obscene materials to a minor, 18 U.S.C. §1470, and federal prohibition on enticement, 18 U.S.C. §2422(b), are different offenses under *Blockburger*). In short, each sovereign will continue to be able to prosecute different crimes in a manner that protects its respective sovereign interests.

Although applying *Blockburger* across sovereigns will still allow subsequent prosecutions when the sovereigns pursue distinct crimes, *Blockburger* and the separate-sovereigns doctrine are not co-extensive. When the federal government criminalizes conduct not to address some distinct federal interest but to be seen as "doing something" to address a perceived problem that has long been the province of state law enforcement, *Blockburger* will not save a subsequent duplicative prosecution that merely rehashes what a prior prosecution has already litigated. But that is a feature, not a bug. Eliminating the separate-sovereigns doctrine and refocusing attention on *Blockburger* will have the salutary benefit of incentivizing sovereigns to avoid duplicative criminal prosecutions and to draft criminal laws that faithfully reflect their distinct sovereign interests, if any. Because the *Blockburger* inquiry looks to the statutory elements of each offense, reliance on *Blockburger* will

require a second-in-time prosecutor to find a criminal offense that criminalizes conduct unique to that sovereign. A sovereign's legislature will know that if it simply rehashes the same elements of another sovereign's criminal offense, or merely repeats those elements while adding a single new element, the Double Jeopardy Clause will appropriately prohibit successive prosecutions. *Cf. Brown*, 432 U.S. at 167 (greater-included offense is "the 'same' for purposes of double jeopardy" as lesser-included offense). That, in turn, will incentivize the legislature to refocus on whether there is really a need for criminalization at that level of government.

Accordingly, eliminating the separate-sovereigns exception and permitting *Blockburger* to apply across sovereigns will likely result in fewer, but clearer, more finely tuned criminal laws, benefiting all parties to the criminal justice system—prosecutors, defendants, defense counsel, and courts. It will have an especially constructive impact at the federal level, in light of the almost universally recognized trend toward "overcriminalization" in federal law. *Yates v. United States*, 135 S. Ct. 1074, 1100 (2015) (Kagan, J., dissenting); *see also, e.g.*, Julie Rose O'Sullivan, *The Federal Criminal Leviathan*, 37 Harv. J.L. & Pub. Pol'y 57, 57 (2014) (noting that there are at least "4,000 criminal statutes, but no one actually knows how many criminal prohibitions exist, in part because Congress regularly delegates to federal agencies the authority to promulgate regulations implementing legislation"); Hon. William H. Rehnquist, *1993 Year-End Report on the Federal Judiciary*, 17 Am. J. Trial Advoc. 571, 575 (1994) (urging Congress to reconsider continuing to "sweep[] many newly created crimes,

such as those involving juveniles and handgun murders, into a federal court system which is ill-equipped to deal with those problems and will increasingly lack the resources in this era of austerity"); Pet'r Br. 42-46. Applying the more focused *Blockburger* inquiry, rather than the free pass of the separate-sovereigns exception, would give Congress an incentive to refocus on whether there is a distinctly federal interest justifying proposed criminal laws, and to avoid scoring political points by simply enacting federal laws that rehash state-level offenses, lard up the U.S. Code, and needlessly divert the resources of the federal criminal justice system.

Finally, eliminating the separate-sovereigns exception makes practical sense given the healthy cooperation between state and federal law enforcement. The federal and state governments have long worked "in cooperation" with each other to address and prosecute crimes in a single jurisdiction. *Bartkus v. Illinois*, 359 U.S. 121, 123 (1959). For example, "[t]o promote cooperation and information-sharing," state and federal officials frequently established task forces whose participants include assistant U.S. Attorneys, state deputy district attorneys, federal agents, and local police department investigators. *United States v. Zone*, 403 F.3d 1101, 1103 (9th Cir. 2005) (per curiam). In cases where federal and state sovereigns both claim jurisdiction, that task force may help "make a strategic decision where to prosecute it." *See id.* Federal and state authorities may also practice "cross-designation," which is "the practice of swearing in a state law enforcement officer as a special deputy United States marshal to assist in joint state/federal task forces," or

"administering a similar oath to federal officers assisting in state prosecutions." *United States v. Lucas*, 841 F.3d 796, 801 n.4 (9th Cir. 2016); *see also, e.g.*, *United States v. All Assets of G.P.S. Auto. Corp.*, 66 F.3d 483, 495 (2d Cir. 1995) (discussing "the cross-designation of a state district attorney as a federal official to assist or even to conduct a federal prosecution"). In still other cases, authorities from one sovereign may share entire files with authorities from another sovereign, and they may even sit alongside each other "at the prosecution table" during trial in a single jurisdiction. *United States v. Figueroa-Soto*, 938 F.2d 1015, 1017 (9th Cir. 1991).

This federal-state cooperation demonstrates that when the "same offense" is prohibited by both state and federal law, coordination between jurisdictions can ensure that the offense is prosecuted once and for all in the proper jurisdiction. Similarly, when one or the other jurisdiction prohibits a different offense under *Blockburger*, state and federal prosecutors will have strong incentives to cooperate and coordinate in ways that reflect the distinct sovereign interests of our national and state governments. Accordingly, the separate-sovereigns exception is largely unnecessary—separate sovereigns can and do cooperate to prosecute a single sovereign's crime—and its elimination will hardly upend the administration of criminal justice. Rather, eliminating the exception will force lawmakers to refocus on each sovereign's distinct interests and promote further federal-state cooperation, which "undoubtedly fosters effective enforcement of the criminal law" and "is surely to be encouraged." *All Assets of G.P.S. Auto. Corp.*, 66 F.3d at 499.

II. Eliminating The Separate-Sovereigns Exception Will Facilitate Plea Bargaining.

Abrogating the separate-sovereigns exception will facilitate the resolution of cases through guilty pleas, rather than full-blown and resource-intensive trials. This Court has recognized that plea bargaining "is an essential component of the administration of justice" that "is to be encouraged." *Santobello v. New York*, 404 U.S. 257, 260 (1971). The potential benefits from efficient plea bargaining are legion: It "leads to prompt and largely final disposition of most criminal cases," "avoids much of the corrosive impact of enforced idleness during pre-trial confinement for those who are denied release pending trial," "protects the public from those accused persons who are prone to continue criminal conduct even while on pretrial release," and, "by shortening the time between charge and disposition, ... enhances whatever may be the rehabilitative prospects of the guilty when they are ultimately imprisoned." *Id.* at 261 (citing *Brady v. United States*, 397 U.S. 742, 751-52 (1970)). And from a practical perspective, efficient plea bargaining is not only desirable but necessary: "If every criminal charge were subjected to a full-scale trial, the States and the Federal Government would need to multiply by many times the number of judges and court facilities." *Id.* at 260. Yet the separate-sovereigns exception currently disincentivizes guilty pleas.[4]

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[4] None of this is to suggest that excessive reliance on plea bargaining does not have its costs. There are many situations in which the plea bargaining dynamic gives prosecutors undue leverage and even the innocent have little practical alternative but to accept a plea. *See generally* Oren Bar-Gill & Omri Ben-

For criminal offenses that could give rise to culpability under both federal and state law, the current separate-sovereigns exception places defense counsel in an untenable position during plea bargaining. If a defendant pleads guilty in one proceeding, that defendant's admission of guilt may later be used against him in a second-in-time proceeding by a different sovereign for the same offense. Courts have "uniformly found that evidence of a defendant's valid prior state-court guilty plea for similar or lesser included conduct is properly admissible in a subsequent federal prosecution, even where admission of the plea could be considered virtually 'tantamount to directing a verdict.'" *United States v. Frederick*, 702 F. Supp. 2d 32, 37 (E.D.N.Y. 2009); *see also id.* (collecting cases and holding that where "there is no allegation of any constitutional defect with the state court plea, there are no grounds for excluding a prior state court plea" in a subsequent federal court prosecution); *see also* Fed. R. Evid. 801(d)(2) (providing that opposing party's statement is not hearsay).

Defense counsel thus may be understandably reluctant to recommend that their clients plead guilty to an offense in one proceeding if that guilty plea may then be used against a client in a subsequent prosecution. For obvious reasons, defense counsel will

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Shahar, *The Prisoners' (Plea Bargain) Dilemma*, 1 J. Legal Analysis 737 (2009). But whatever other measures are appropriate to make plea bargaining fairer and more efficient, it makes little sense to have a judge-made doctrine like the separate-sovereigns doctrine serve as an impediment to efficient plea bargaining in a whole class of cases.

not want to encourage their clients to plead guilty if doing so will hand a second-in-time prosecutor near-conclusive evidence (*i.e.*, a virtually insurmountable admission of guilt for the same offense in open court) for use in a subsequent prosecution.[5]

To be sure, first-in-time defense counsel can try to negotiate an agreement with a potential second-in-time prosecutor precluding the prosecutor from using the defendant's guilty plea or accompanying allocution in any subsequent trial. But that is not always—or even frequently—possible. If no charges have yet been filed in the potential second jurisdiction, there may be no prosecutor with whom defense counsel can negotiate. This problem is particularly pervasive in cases where there are multiple potential venues for a subsequent prosecution. Furthermore, even if first-in-time defense counsel is able to identify and contact the potential second-in-time prosecutor, defense counsel may not be licensed to practice in that second jurisdiction, and may thus be unable to negotiate or enter into a binding agreement with the prosecutor. And, of course, the second-in-time prosecutor may simply not agree to foreclose introduction of a prior guilty plea at a subsequent trial, especially when the subsequent investigation is in its nascent stages. *See*

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[5] The plea bargaining dynamic underscores the superiority of the *Blockburger* framework over the separate-sovereigns exception. When the elements of the federal and state offenses are materially different, the plea to the first offense still leaves prosecutors in the second jurisdiction with distinct elements to prove. But since the separate-sovereigns exception allows a second prosecution even when the elements are identical, it creates a dynamic where the plea to the first offense leaves the defendant with no defense to the follow-on prosecution.

United States v. Long, 852 F.2d 975, 979 (7th Cir. 1988).

Pleas of *nolo contendere* (or "no contest"), rather than guilty pleas, may provide some protection in second-in-time proceedings. *See* Fed. R. Evid. 803(22). But some states do not authorize such pleas,[6] and they may be strongly disfavored in practice even when technically permitted. *See, e.g.*, *United States v. Dorman*, 496 F.2d 438 (4th Cir. 1974) (upholding district court's refusal to accept defendant's *nolo contendere* plea based on judge's "general rule" not to consent to such pleas). In all events, while in a subset of cases there may be creative ways of surmounting the difficulties that the separate-sovereigns exception presents for defense counsel advising a client on a guilty plea, there are other cases where the obstacles are insurmountable, and there is no valid reason for inflicting the costs of creative workarounds in the others. Eliminating the separate-sovereigns exception would remove all these obstacles and facilitate efficient plea bargaining in the many cases where the criminal offenses of multiple jurisdictions are potentially applicable.

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[6] *See, e.g.*, *State v. Salisbury*, 147 P.3d 108, 112 (Idaho Ct. App. 2006) ("[T]here is no ... Idaho statute or rule that provides for *nolo contendere* pleas."); *Ideal Mut. Ins. Co. v. Winker*, 319 N.W.2d 289, 291 (Iowa 1982) (noting that "we do not have the plea of *nolo contendere*"); *People v. Daiboch*, 191 N.E. 859, 860 (N.Y. 1934) ("The plea of 'non vult' or 'nolo contendere' is an ancient plea in criminal cases still in use in some of the states but abolished here."); *Kibler v. State*, 227 S.E.2d 199, 201 (S.C. 1976) ("[T]he proper procedure for our lower courts to follow is to refrain from accepting pleas of Nolo contendere in felony cases until such are authorized by our legislature.").

III. Upon Elimination Of The Separate-Sovereigns Exception, The Double Jeopardy Clause Should Apply To Both The Federal Government And The States.

As reflected in the arguments set forth above, the elimination of the separate-sovereigns exception should produce the same result whether the second-in-time prosecution is brought by the federal government (as in this case) or a state government. No matter which sovereign comes second, the Double Jeopardy Clause bars prosecution of the "same offence" prosecuted in the first proceeding.[7] That much plainly follows from incorporation doctrine. Insofar as the evolution of incorporation doctrine is one of the reasons for reconsideration of the separate-sovereigns exception in the first place, *see* Pet'r Br. 35-42, it would be particularly bizarre not to apply the Double Jeopardy Clause (stripped of the judicially created separate-sovereigns exception) only in federal court. Thus, whether the first prosecution was state or federal and whether the follow-on prosecution is state or federal, the second-in-time prosecutors should not be able to pursue charges for the "same offence."

The underlying purpose of the Double Jeopardy Clause reinforces this conclusion. Just as "[t]he Double Jeopardy Clause is not such a fragile guarantee that prosecutors can avoid its limitations by the simple expedient of dividing a single crime into a series of temporal or spatial units," *Brown*, 432 U.S.

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[7] As this Court has made clear, moreover, the Clause bars a second prosecution for the same offense whether the first prosecution resulted in an acquittal or a conviction. *Brown*, 432 U.S. at 165.

at 169, the Clause cannot be evaded by mere strategic timing and location of first-in-time prosecutions. Irrespective of the initial forum, the Double Jeopardy Clause is intended to "shield individuals from the harassment of multiple prosecutions for the same misconduct." *Puerto Rico v. Sánchez Valle*, 136 S. Ct. 1863, 1877 (2016) (Ginsburg, J., concurring). Unless the Double Jeopardy Clause is to be treated as a pleading obstacle, rather than a fundamental guarantee of liberty, the protections afforded by the Clause must apply whether the second-in-time prosecution is brought by the federal government or by a state.

The fundamental unfairness of duplicative prosecutions prohibited by the Double Jeopardy Clause does not depend on the order of the prosecutions. At bottom, the Double Jeopardy Clause is motivated by a concern for the *individual*. The individual's interest in securing finality as to an accusation of criminal conduct is plainly just as apparent in state-first and federal-first prosecutions:

> The underlying idea, one that is deeply ingrained in at least the Anglo-American system of jurisprudence, is that the State with all its resources and power should not be allowed to make repeated attempts to convict an individual for an alleged offense, thereby subjecting him to embarrassment, expense and ordeal and compelling him to live in a continuing state of anxiety and insecurity, as well as enhancing the possibility that even though innocent he may be found guilty.

Green v. United States, 355 U.S. 184, 187-88 (1957). It is an equal "affront to human dignity and just as dangerous to human freedom for a man to be punished twice for the same offense, once by a State and once by the United States, as it would be for one of these two Governments to throw him in prison twice for the offense." *Abbate*, 359 U.S. at 203 (Black, J., dissenting).[8]

To provide that much-needed finality, irrespective of whether the federal or state prosecution proceeds first, "a final judgment in a criminal case, just as a final judgment in a civil case, should preclude renewal of the fray anyplace in the Nation." *Sánchez Valle*, 136 S. Ct. at 1877 (Ginsburg, J., concurring) (citations omitted). Finality in the criminal context is, after all, even more important than finality in the civil realm. *See United States v. Oppenheimer*, 242 U.S. 85, 87-88

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[8] *Accord, e.g.*, *Moore v. Illinois*, 55 U.S. 13, 21-22 (1852) (McClean, J., dissenting) ("[T]he criminal laws of the Federal and State Governments emanate from different sovereignties; but they operate upon the same people, and should have the same end in view ... no government, regulated by laws, punishes twice criminally the same act."); Daniel A. Braun, *Praying to False Sovereigns: The Rule Permitting Successive Prosecutions in the Age of Cooperative Federalism*, 20 Am. J. Crim. L. 1, 9 (1992) ("The cases that articulate and apply the dual sovereignty doctrine misrepresent a basic, structural features of American government. Their [erroneous] lesson, put simply, is that polities, not people, possess sovereign power in this country."); *id.* at 26 ("The people of the United States constitute the only sovereign power recognized under the nation's law."); *see Cohens v. Virginia*, 19 U.S. (6 Wheat.) 264, 347 (1821) ("The people of the United States are the sole sovereign authority of this country."). *See also, e.g.*, J.L. Brierly, The Law of Nations 150 (5th ed. 1955) ("sovereignty" is a "much-abused word").

(1916) (noting that "[i]t cannot be that the safeguards of the person, so often and so rightly mentioned with solemn reverence, are less than those that protect from a liability in debt"). And conditioning finality on a prior state-court prosecution has serious implications for criminal practice—for example, it frustrates state courts' abilities require the defense to opt into reciprocal discovery. *See* Fed. R. Crim. P. 16(b) (imposing parallel discovery on the defense when the defense requests discovery from the prosecution). Given the large-scale information sharing between authorities, a defendant might be deprived of the ability to forgo revealing a defense before a potential trial in the second-in-time forum.

There is no practical need to make the Double Jeopardy Clause a one-way ratchet, since all of the benefits of federal and state cooperation run both ways. As Judge Calabresi has explained, the considerable frequency of federal-state prosecutorial cooperation "should cause one to wonder whether it makes much sense to maintain the fiction that federal and state governments are so separate in their interests that the dual sovereignty doctrine is universally needed to protect one from the other." *All Assets of G.P.S. Auto. Corp.*, 66 F.3d at 499.

This Court has embraced Justice Kennedy's observation that the "genius" of the Framers was to recognize that subjecting the People to two sovereigns, rather than one, would enhance liberty. *Saenz v. Roe*, 526 U.S. 489, 504 n.17 (1999) (quoting *U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779, 838 (1995) (Kennedy, J., concurring)). The Framers' insight was genius precisely because it runs counter to the

intuition that doubling the number of sovereigns would double the sources of tyranny. The vast bulk of this Court's jurisprudence is faithful to and indeed facilitates the Framers' vision. But the judge-made separate-sovereigns doctrine stands out like the proverbial sore thumb. Allowing a second sovereign to pursue separate criminal charges out of a single incident without any regard to whether the two prosecutions involve the "same offence" is the very embodiment of the intuition that two sovereigns pose a greater threat to liberty than just one. The Court should take this opportunity to vindicate the Framers' liberty-enhancing vision and discard a doctrine that licenses two sovereigns to put an individual's liberty in jeopardy twice for the same offense.

CONCLUSION

For the foregoing reasons, this Court should overrule the separate-sovereigns exception to the Double Jeopardy Clause and reverse the judgment of the Eleventh Circuit.

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